

**From:** [Szelag.Matthew@epamail.epa.gov](mailto:Szelag.Matthew@epamail.epa.gov)  
**To:** [Niemi, Cheryl \(ECY\)](#)  
**Subject:** Re: FW:  
**Date:** Thursday, January 24, 2013 5:34:27 PM  
**Attachments:** [Flannery 304m decree.rtf](#)

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Hi Cheryl,

Here is a copy of the consent decree NRDC v Train that's mentioned in the 1980 criteria document. I haven't had a chance to read it yet....but hope there's something helpful in here.

(See attached file: *Flannery 304m decree.rtf*)

Thanks,

Matthew Szelag  
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 "Niemi, Cheryl (ECY)" ---01/22/2013 10:54:26 AM---Hi Matt. Thought you might be interested in these pieces sent over from Ken Johnson. They discuss E

From: "Niemi, Cheryl (ECY)" <[cnie461@ECY.WA.GOV](mailto:cnie461@ECY.WA.GOV)>  
To: Matthew Szelag/R10/USEPA/US@EPA  
Date: 01/22/2013 10:54 AM  
Subject: FW:

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Hi Matt.

Thought you might be interested in these pieces sent over from Ken Johnson. They discuss EPA history and policy on risk and fish consumption rates.

Also – do you happen to have a copy of the Consent Decree in NRDC v. Train, as referenced in the following 1980 criteria document at [http://water.epa.gov/scitech/swguidance/standards/upload/2001\\_10\\_12\\_criteria\\_ambientwqc\\_hexachlorocyclohexa80.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/2001_10_12_criteria_ambientwqc_hexachlorocyclohexa80.pdf), on page C-36? I am still looking for more information to fill in the story of where the risk levels come from, and this is something that might add to what EPA was thinking in the late 1970's. I have tried to find this consent decree via google searches, but cannot find anything but a decision that seems to be related to CAA issues. The citation in the criteria document seems to reference a case that specifically deals with water.

Talk with you later – thanks,

Cheryl

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**From:** Johnson, Ken [<mailto:ken.johnson@weyerhaeuser.com>]  
**Sent:** Friday, January 18, 2013 3:53 PM  
**To:** Susewind, Kelly (ECY); Gildersleeve, Melissa (ECY); Niemi, Cheryl (ECY)  
**Subject:**

Kelly, Melissa and Cheryl

I have previously requested an opportunity for a business group to meet with you for more directed discussion on various issues entwined with the HHWQC development process. You have agreed and we are working to identify candidate meeting dates. We would provide an agenda of topics before the meeting. In the interim, there are several documents which can be shared. Some of our agenda topics are supported by these materials.

The first pdf is titled "Summary and Legal Analysis of EPA and State Authority in Setting Fish Consumption Rates." It was produced by the Federal Water Quality

Coalition, a membership organization comprised of Fortune 500 companies and industry associations, which sponsors legal analyses on emerging Clean Water Act issues. The subject matter will be very familiar to you. This work product delineates the respective EPA and states roles in deriving water quality standards, with a particular focus on the selection of a fish consumption rate in the case of human health-based criteria. The two sentences which summarize this paper are:

"At each level of the federal water quality regulatory scheme – from statute, to regulation, to non-binding agency guidance – states are unequivocally vested with primary authority to determine fish consumption rates as a step in developing or revising their water quality standards. Faced with a proposed water quality standard that includes criteria protective of the relevant designated uses, EPA has no authority to disapprove." p. 5

The second pdf is a white paper titled "Water Quality Risk Policy for the Protection of Human Health." This paper describes the current state risk policy for water quality human health criteria. One of the key messages in this analysis is that the current risk policy protects the general population to a 10<sup>-6</sup> excess cancer risk level as long as subpopulations are protected to a level of 10<sup>-4</sup>. That was the intent of the state policy when it was adopted in 1992, and was an important basis for a 1995 decision by the 9<sup>th</sup> Circuit to affirm the dioxin TMDL for the Columbia River and is implicit in Ecology's adoption of the National Toxics Rule in 1997. This is the starting point for Ecology's consideration of possible HHWQC revisions. The agency communications should be true to this policy and adopted criteria.

The third set of documents have previously been provided to you via a drop box. They are the U.S. Court of Appeals, Ninth Circuit decision in Dioxin/Organochlorine Center, et. al., v. EPA; and the EPA brief in support of the dioxin TMDL developed by that agency for the Columbia River. The EPA offers a concise explanation on the protectiveness of HHWQC with excess cancer risks in the 10<sup>-6</sup> to 10<sup>-4</sup> range, how the consumption of 6.5 gr/day of maximum residue fish is protective of sub-population groups in the Columbia River basin consuming up to 150 gr/day; i.e., how to account for anadromous fish, and various other issues raised by appellants. The Ninth Circuit accepted EPA reasoning and upheld the TMDL. EPA's explanation on this set of issues informs on their intentions with the National Toxics Rule, subsequently adopted by the state of Washington into WAC 173-201A.

The final pdf has also previously been provided to you. It is titled "A Review of Methods for Deriving Human Health-Based Water Quality Criteria with Consideration of Protectiveness" and was developed by the National Council for Air and Stream Improvement. This white paper identifies and explains the parameters relevant to the derivation of HHWQC, the substantial conservatism in the traditional selection of point values for those parameters, and quantifies the resulting compounded conservatism of the derived criteria. Appendices include a discussion on the factors which influence the quality of fish consumption rate determinations; the issue relevant to the accumulation of persistent, bioaccumulative and toxic chemicals by salmon; and a comparison of fish tissue concentrations allowed by HHWQC to other regulatory mechanisms controlling pollutants in fish.

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[attachment "fcrlegalmemo010713.pdf" deleted by Matthew Szelag/R10/USEPA/US] [attachment "Water Quality Risk Policy for Human Health.pdf" deleted by Matthew Szelag/R10/USEPA/US]